

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
CRIMINAL REVISION APPLICATION No. 40 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed
to see the judgment ? Yes

2 To be referred to the Reporter or not ? No.

3 Whether their Lordships wish to see the fair copy
of the judgment ? No.

4 Whether this case involves a substantial question
of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ? No.

5 Whether it is to be circulated to the civil
judge ? No.

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**JAYSHREEBEN, D/O MANILAL VISABHAI PURABIYA & 1 -
Applicant(s)**

Versus

CHANDRAKANT BABULAL MAKWANA & 1 - Respondent(s)

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Appearance :

MR BN PATEL for Applicant(s) : 1 - 2.

RULE SERVED for Respondent(s) : 1,

MR KC SHAH APP for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 03/12/2007

ORAL JUDGMENT :

1. The petitioners have filed this Criminal Revision Application under Section 397 read with Section 401 of the Code of Criminal

Procedure, 1973 (Hereinafter referred to as Cr.P.C.") and challenged the order passed by the learned Judge, Family Court No.2, Ahmedabad on 15-11-2006 in Cri. Misc. Application No.395 of 2006 and rejected the application filed by the petitioners u/s 127 of the Cr.P.C. for enhancement of the maintenance.

2. Petitioner No. 1 is the wife and petitioner No. 2 is the son of the respondent. The petitioners filed Cri. Misc. Application No.6658 of 2000 before Family Court, Ahmedabad against the respondent - husband and claimed maintenance u/s 125 of the Cr.P.C. The Court after considering the evidence awarded Rs.500/- p.m. to the petitioner - wife and Rs.250/- p.m. to the son towards maintenance from the date of the application and also directed to pay Rs.250/- towards costs. The petitioners moved Cri. Misc. Application Nos.1449 of 2003 and 394 of 2006 for execution of the order u/s 125 (3) of the Cr.P.C. The trial court sentenced the respondent for nonpayment of arrears of maintenance. The petitioners also filed Cri. Misc. Application No.395 of 2006 u/s 127 of the Cr.P.C. for enhancement of the maintenance amount awarded

by the court on the ground of change in circumstances. The trial court rejected the application and therefore the petitioners have filed this criminal revision application.

3. I have heard learned advocate Mr. B.N. Patel for the petitioners. The Board indicates that notice of Rule is served to the respondent - husband. But none appears on behalf of the respondent. I have also heard learned A.P.P. Mr. K.C. Shah for the respondent - State.

4. Learned advocate for the petitioners has produced a copy of the original maintenance application with the copy of the order passed by the trial court as directed by the Court (Coram : M.D. Shah, J.) by order dated 10-7-2007.

5. It appears from the impugned order that the trial court without considering the merits of the application or without permitting the petitioners to adduce evidence to prove change in the circumstances passed the impugned order and came to conclusion that when the respondent is unable to pay

arrears of maintenance, there is no increase in the income of the respondent and therefore there is no change in circumstances. In my view, the trial Court committed serious error in coming to the conclusion that there is no change in circumstances. The Court has not dealt with contentions raised by the petitioners in the application and has not afforded any opportunity to the petitioners to prove the contentions. Learned advocate Mr. Patel has stated that the respondent offered to pay Rs.1000/- but it was not acceptable to the petitioners and therefore the learned Judge rejected the application. It appears from the impugned order that learned Judge has made reference of offer in his order and has refused to enhance the amount only because the offer was not acceptable to the petitioners. In my view, approach of the court was not legal and justifiable. The trial court ought to have decided the application on merits. It appears that as the petitioners did not accept the offer made by the respondent the Court expressed its anguish by passing the impugned order.

6. It also appears from the impugned order that simply because the respondent was not able to pay arrears of maintenance the trial

court came to conclusion that there was no increase in the income or there was no change of circumstances. In my view, if this view is accepted then every husband against whom maintenance order is passed would not pay the maintenance amount and would come with a defence in enhancement proceedings that as he is unable to pay the arrears, there is no change in circumstances. The conclusion is reached without permitting the petitioners to adduce evidence in support of their case. Therefore, the impugned order is perverse and erroneous and hence the same is required to be set aside.

7. In the result, this Criminal Revision Application succeeds and the impugned order passed by the learned Judge, Family Court No.2, Ahmedabad on 15-11-2006 in Cri. Misc. Application No.395 of 2006 is set aside and Cri. Misc. Application No.395 of 2006 is remanded to the trial court with a direction to decide the same in accordance with law after affording opportunity of hearing to the parties. Rule is made absolute to the aforesaid extent.

(Bankim N. Mehta, J.)

/JVSatwara/